Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

(2)

No. 91-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

EVA CASAZZA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN THOMAS MORAN
Counsel of Record
THE LAW OFFICES OF
JOHN THOMAS MORAN
LaSalle Law Centre
210 West Illinois Street
Third Floor
Chicago, Illinois 60610
(312) 670-0312

Counsel for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

12

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
OPINION BELOW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	PAGE
Bumper v. North Carolina, 391 U.S. 543 (1968) ..	6
People v. Casazza (1991), 144 Ill.2d 414	6
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ..	5
Segura v. United States, 468 U.S. 796 (1984) ...	6, 8
State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984) ..	7
Vale v. Louisiana, 399 U.S. 30 (1970)	5
United States v. Napue (7th Cir. 1987), 834 F.2d 1311	7
United States v. Faruolo (2d Cir. 1974), 506 F.2d 490	6

Other Authorities	
U.S. Constitution, amend. IV	5
2 W. LaFave, SEARCH AND SEIZURE (2d ed. 1989) § 6.1, 5(b), (c)	4, 7, 8
2 W. LaFave, SEARCH AND SEIZURE (2d ed. 1989) § 8.2(c)	5, 6

No. 91-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

EVA CASAZZA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 144 Ill.2d 414 (1991).

STATEMENT OF THE CASE

Will County Sheriff's deputies Farmer and Jencon approached respondent Kenneth Chartier's 50-foot boat,

moored along the Kankakee River, about 2:30 p.m. on September 4, 1989, and met respondent Mrs. Elizabeth Chartier, who invited them on board. The officers knew that Mrs. Chartier, her husband Kenneth, and their guests were living on the boat, celebrating the Labor Day weekend. (R. 23) The officers asked Mrs. Chartier to consent to a search of the boat. She refused. (R. 9) They then informed her that she and her guest (respondent Eva Casazza) would have to leave the boat until a search warrant was obtained. After collecting some of their belongings, and as they were leaving the boat, Kenneth Chartier appeared at the dock. (R. 9-10) He was asked to consent to a search. He asked what would happen if he refused and was told that everyone would have to leave the boat until a search warrant was obtained. He then signed a consent to search form in the living room of the boat. (R. 11, 17) The State argued against suppression of a small amount of cannabis, arguing that the consent was voluntary. Respondents' counsel argued that the consent was obtained under duress, that Mr. Chartier and his guests would have to leave their residence until a warrant was obtained, without knowing how many hours this might take.[1]

The trial court found that both Mr. and Mrs. Chartier initially refused consent and that consent was only given by Mr. Chartier when informed a search warrant would be obtained anyway and that he, his wife and his guests would be compelled to leave their residence in the interim,

---

[1] Respondents were charged with two Class B misdemeanors: possession of between 2.5 and 10 grams of cannabis (Ill.Rev.Stat. 1989, ch. 56½, ¶ 704(b)), delivery of 2.5 grams or less of cannabis (Ill.Rev.Stat. 1989, ch. 56½, ¶ 705(a)), and a penalty enhancement for delivery to a person under 18 by a person more than 3 years older (Ill.Rev.Stat. 1989, ch. 56½, ¶ 707).

without knowing how many hours the police would keep them from their residence. (R. 44-47) The Court stated:

> "And the testimony was that they [respondents] had been occupying the boat for several days. It was the Labor Day Weekend. And they were told that they had to get off the boat.
>
> Now, it was only then that Mr. Chartier indicated that he would consent. It seems apparent to me that this consent then was made under a threat of duress; that unless it was given, the warrant would be obtained and they would have to get off the boat.
>
> For how long, we don't know. There has been no testimony from the officers or from anyone else that it would only be 10 minutes or 15 minutes or 20 minutes and the warrant would be procured and they would only have to be off the boat for that period of time, for a relatively short period of time.
>
> For all Mr. Chartier knew, it could be hours and hours before that warrant would be obtained. They were off the boat in the meantime.
>
> Now, what could the officers have done? I don't think I have to speculate about what they could have done, but I don't think they necessarily would have—I think they probably could have posted someone at the dock to watch the boat while the warrant, an effort was being made to obtain the warrant.
>
> I don't necessarily think it was, from the standpoint of police procedure, necessary to tell the occupants of the boat that they would have to get off the boat while the warrant was being obtained. But that is really not material because I don't think the officers had the right to tell the occupants that they had to get off that boat while the warrant was being procured.
>
> * * * I don't need to reach the other issues raised, whether Mrs. Chartier's consent would be required

before a search could be conducted and whether Mr. Chartier's consent would authorize the search of Eva Casazza's room, the room occupied by her on the boat. I don't need to reach those issues." (R. 46-48)

SUMMARY OF ARGUMENT

The case below does not present an important question of federal law which has not been, but should be, settled by this Court but considered the voluntariness of a consent given after one was informed that a search warrant would be obtained and that while that warrant was being obtained, the person giving that consent and his guests would have to leave their residence.

ARGUMENT

The Petition for Writ of Certiorari meets none of the "character of reasons" upon which this Court should exercise its discretion and should be denied. Petitioner's question presented misdirects this Court's attention to the legality of the "impoundment" of a dwelling place in a case in which the issue raised below was not impoundment but the voluntariness of a consent to search where all the courts below found the consent given herein to be "involuntary." The trial record gives no support to petitioner's conclusion of constitutional error nor gives a proper factual substratum to the question presented.

Relying upon Professor Wayne LaFave's comments in § 6.5 of his treatise, SEARCH AND SEIZURE, Petitioner has constructed an argument addressing an issue reached only

in passing, and which ignores those conditions precedent to what Professor LaFave himself termed the "impoundment alternative." Petitioner argues that: "impoundment of premises for the purpose of maintaining the *status quo* while a search warrant is sought should be recognized as a legitimate warrantless procedure within the parameters of the fourth amendment." (Petition, p. 13)

But this argument goes far beyond the facts of the case and simply ignores the fundamental preconditions for the legal conclusion advanced, and ignores the fundamental question of whether consent to search given after a police threat to obtain a search warrant coupled with a statement that respondents would have to vacate their residence until such warrant is obtained is "voluntary." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49.

Procedurally, in this cause there was no finding of probable cause, either to arrest any of the respondents or for issuance of a search warrant. Nothing by way of evidence presented at the pretrial hearing demonstrated the existence of any "exigent circumstances" or "intimated that the officers reasonably believed that destruction, removal or concealment of contraband material was imminent or threatened." *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970). The police did not appear at respondent Kenneth Chartier's boat until 2:30 p.m. on Monday, September 4, 1989 of the Labor Day Weekend, and did not arrest any respondent.

Here, the trial court found that the police told respondents that they could or would *obtain* a search warrant if Kenneth Chartier did not consent to a search. As noted in 2 W. LaFave, SEARCH AND SEIZURE (2d ed. 1989) § 8.2(c) at pages 186-7, the impact of law enforcement officers telling a person that they would "obtain" a search

warrant "is an extremely important one" and can be, as in *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), "instinct with coercion." Such an admonition tells an individual that he or she is faced with merely submitting to the inevitable, and conveys the "erroneous belief that [one] cannot protect his privacy by refusing to give consent. *Id.* at 188. LaFave states that under the "better view" "it is not enough that [the police] threat was made in the good faith expectation that a warrant would issue, there must *in fact* be probable cause." *Id.*; *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974).

To this "threat" the police added that respondent Kenneth Chartier, in making his decision to consent or not, should also consider that he and the other respondents would have to leave the boat for whatever period of time it would take the officers to "obtain" the search warrant. The trial court was particularly concerned with the failure of the State to introduce *any* evidence on this question, as the police were requiring respondents to leave their residence in the interim: "For all Mr. Chartier knew, it could be hours and hours before that warrant would be obtained. They were off the boat in the meantime." It was on this matrix of facts that Kenneth Chartier's consent was found involuntary, not merely that the "occupants would have to leave [the boat] if he did not consent to a search." *People v. Casazza* (1991), 144 Ill.2d 414, 418.

In this context of the voluntariness of a consent to search, petitioner raises the constitutionality of "impoundment" allegedly upheld by this Court in Parts I and IV of *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), to bootstrap his real argument, that if impoundment is constitutional then it was *ipse jure* non-

coercive to so admonish Kenneth Chartier and therefore his consent was "voluntary." But see 2 W. LaFave, § 6.5(c).

The problem with this argument, as a matter of stare decisis, is that Part IV of *Segura* is joined by but one other justice and Part I has been dismissed as merely a poorly constructed summary of the subparts of the majority opinion. A substantial body of critics (see *United States v. Napue* (7th Cir. 1987), 834 F.2d 1311, 1326 n. 16; *State v. Bolt* (1984), 142 Ariz. 260, 689 P.2d 519), and this case), reject any binding effect upon lower federal and state courts of either Part IV or Part I of that opinion.[2] Indeed, a fair reading of *Segura* is that Part IV at best for petitioner is *dicta*, a majority of this Court clearly finding that there was an independent basis for discovery of the contraband, noting that it was found pursuant to a valid search warrant. (468 U.S. 796, 813-5.) That is not within the factual matrix of the case at bar.

But even if *arguendo*, Part IV of *Segura* was precedential, it expresses no opinion "when, if ever, impoundment may legitimately extend to limiting the freedom of movement of persons *within*, into or out of the impounded premises." 2 LaFave § 6.5(c), p. 676 (emphasis supplied.) It is noteworthy that Petitioner's paraphrase of this conclusion of Professor LaFave, (Petition at 11-12), omits the word "within," apparently assuming that the *exclusion*

---

[2] *Segura* is "rather obscure . . . ." 2 W.LaFave § 6.5(c), p. 673. In footnote 84 of his treatise, Professor LaFave writes that:

> For a telling criticism of *Segura*, see Dressler, A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftmanship of *Segura v. United States*, 26 Wm. & Mary L.Rev. 375 (1985) (concluding with some justification at 422 that "*Segura* is a disaster as a written opinion"); Note, 38 Vand.L.Rev. 1589 (1985).

of respondents from the boat was legal. But nothing in *Segura* supports this notion. Indeed, *Segura* set a limit of 19 hours for securing of a search warrant in a metropolitan area after the arrest of the petitioners. (468 U.S. at 812-13.) Petitioner also ignores that any physical entry onto Kenneth Chartier's boat to effectuate impoundment would constitute, even under *Segura*, both a seizure and a search. 2 LaFave at p. 676; *Segura v. United States*, 468 U.S. 796, 811.

Chapter 6 of Professor LaFave's treatise is entitled **"ENTRY AND SEARCH OF PREMISES."** As noted in § 6.1 therein, "evidence will be subject to suppression if the [police] entry [to arrest] was unconstitutional." 2 W. LaFave (2d. ed. 1987), § 6.1, p. 562. Subsection 6.5(b) is entitled **"Exigent circumstances: destruction or removal of evidence."** Its very title suggests two factual determinations that are necessary preconditions before reaching **"The impoundment alternative"** in § 6.5(c): probable cause to arrest and the existence of "exigent circumstances" such as the impending destruction or removal of evidence. Here, the trial court never found the existence of such "exigent" circumstances. Because of his decision on voluntariness, the trial court never reached the question of probable cause and expressly did not reach other questions raised by respondents, including "whether Mrs. Chartier's consent would be required before a search could be conducted and whether Mr. Chartier's consent would authorize the search of Eva Casazza's room, the room occupied by her on the boat." (R. 48)

Petitioner states that there was probable cause though no arrests were made prior to the search conducted. (Petition, p. 14) Petitioner seeks review by this Court to "sanction" the constitutionality of the "impoundment alternative" despite the fact that no such procedure was util-

ized in the cause below and there was no finding of any "exigent circumstance" including destruction or removal of evidence. Petitioner ignores both that this is a voluntariness of consent case, and the specific circumstances surrounding Kenneth Chartier's consent, including the impact of the police advice that they would be obtaining a search warrant and the lack of any time frame in which that would occur in light of the exclusion of respondents from their residence while the warrant was "obtained." In sum, the Supreme Court of Illinois's affirmance of the finding of the trial court that respondent Kenneth Chartier's consent to search was involuntary was proper and the petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN THOMAS MORAN
Counsel of Record
THE LAW OFFICES OF
JOHN THOMAS MORAN
LaSalle Law Centre
210 West Illinois Street
Third Floor
Chicago, Illinois 60610
(312) 670-0312

Counsel for Respondents